IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 63 OF 2002

1. Mr. Agnelo Barreto,
   R/o. H.No.378, ward No.14,
   Caranzalem, Goa.

2. Mrs. Zalia Barreto,
   R/o. H. No.378, Ward No.14,
   Caranzalem, Goa. ... Appellants

versus

1. Mr. Xavier Fernandes,
   R/o. Silver Arc Apartments,
   Opp. St. Inez Church,
   St. Inez, Panaji, Goa.

2. Mrs. Martha Fernandes,
   R/o Silver Arc Apartments,
   Opp. St. Inez Church,
   St. Inez, Panaji,Goa.

3. Mr. Minguel Fernandes,
   R/o. Ward No.14,
   Caranzalem, Goa.

4. Mr. Abel Costa Campos
   e Oliveira, Alias Abel
   Costa Campos,
   R/o Ward No.14,
   Caranzalem-Goa. ... Respondents

Mr. S. S. Kantak with Ms. R. Chodankar, Advocates for the Appellants.

Mr. S. G. Dessai, Senior Advocate with Mr. A. R. Kantak, Advocate for the Respondent Nos.1 and 2.
Mr. Zeller D'Souza, Advocate for the Respondent No.4(absent).

None for the Respondent No.3.

CORAM : N. A. BRITTO, J.

DATE : 28TH OCTOBER, 2005

ORAL JUDGMENT

The defendant nos.1 and 2 in Special Civil Suit No.250/91/B have filed this Second Appeal which was admitted by the Order of this Court dated 27-6-2003 on a substantial question of law, which reads as follows:-

> "On the facts and circumstances of the case, whether the Appellants are entitled to continue in the suit structure to which they were shifted before demolition of the old ancestral house, till such time they are given alternate premises by Respondent Nos.1 and 2 irrespective of their claim for mundkarship of the old ancestral house".

2. The plaintiffs had filed the suit, inter alia, for the eviction of defendant nos.1 and 2 from the suit premises which was referred to as suit tenement no.1. The plaintiffs claimed that they were the owners in possession of the suit property known as "Correalem Morod" surveyed under Chalta No.12 of P.T. Sheet No.153. In the said property there was a big residential house which has been demolished by the plaintiffs. The defendant no.1 was an orphan and was brought up in Mumbai by the mother of plaintiff no.2 by name Gracy Fernandes, though, in the Baptism Certificate the parents of defendant no.1 were shown to be Perpetua and John, the said Perpetua being the sister of plaintiff no.2. The said Gracy Fernandes who was then residing in Mumbai retired from service in the year 1975 or thereabout and came to reside in the said ancestral house of the plaintiffs. When the said big house was demolished by the plaintiffs, Aurora, the sister of the plaintiff no.1, both the defendants and defendant no.3 were residing in the big house and it was the case of the plaintiffs that the defendant nos.1 and 2 were allowed to reside in the said suit tenement no.1 temporarily. It was the case of the

plaintiffs that defendant nos.1 and 2 had no right to the said suit tenement no.1 and as they were falsely claiming rights to the old residential house, the plaintiffs terminated their licence in respect of the said suit tenement no.1 and then filed a suit for their eviction. It appears that defendant nos.1 and 2 had filed a suit against the plaintiffs bearing R.C.S. No.105/90 and though initially an ex parte temporary injunction was granted in favour of the defendant no.1 in the said Civil Suit, the same was vacated and ultimately, the said Civil Suit was dismissed. The defendant no.1 also filed application claiming a right of mundkarship before the Mamlatdar in respect of the said big residential house which was also dismissed and subsequently an appeal filed against the same was withdrawn by defendant no.1 before the Collector. The defendant nos.1 and 2 denied the claim of ownership of the plaintiffs and had pleaded that they had come to know that the suit property belonged to defendant no.4. The defendant nos.1 and 2 had also pleaded in their written statement that the big residential house demolished by the plaintiffs was in fact their mundkarial house which was demolished by giving false promises by the plaintiffs, the false promise being that the defendant nos.1 and 2 would be given a

flat in the place of the partly demolished old residential house but once, the defendants said mundkarial house was demolished the plaintiffs began to dodge the defendants and, therefore, the defendants were forced to file the said Civil Suit before the Civil Judge, Junior Division being R.C.S. No.105/90/D, an application for temporary injunction which as already stated have been disposed of.

3. The learned trial Court partly decreed the suit, and, inter alia, ordered the eviction of defendant nos.1 and 2 from suit tenement no.1 and ordered them to vacate the same within a period of 30 days. The learned trial Court held that the plaintiffs were the owners of the suit property based on the Gift Deed dated 31-1-1978 executed by Aurora, the sister of plaintiff no.1 and further held that the defendant no.1 had admitted that plaintiff no.1 had allowed the defendant no.1 to stay temporarily in the suit tenement and since the defendant nos.1 and 2 had admitted that they were let the possession of the suit tenement by the plaintiffs, the defendant nos.1 and 2 could not deny the title of the plaintiffs. The learned trial Court also came to the

conclusion that the defendant no.1 had admitted that the suit tenement was constructed by the plaintiff no.1 and since the licence given to the defendant no.1 was terminated, the defendant nos.1 and 2 continued to be trespassers without any right to occupy the same and as such, the plaintiffs were entitled for an order, inter alia, evicting defendant nos.1 and 2 from the suit tenement. The defendant nos.1 and 2 having preferred an appeal to the District Court, being R.C.A. No.191/2000, the same was dismissed by Judgment dated 18-3-2002. It follows from that, that there are concurrent findings given by both the Courts below not only that the plaintiffs are the owners of the suit property and the big house that has been demolished but also that the suit tenement was constructed by the plaintiffs and the defendant no.1 having been allowed to occupy the same temporarily, had no right to continue the occupation of the same after the licence was terminated. In fact, it was not disputed that defendant nos.1 and 2 were residing in the big house at the time of demolition in the year 1989 along with Aurora Fernandes, the sister of plaintiff no.1 and Minguel(defendant no.3), the nephew of the plaintiff no.1, and, all four of them went to occupy the suit tenement because of demolition of the said big house.

4. Mr. S. S. Kantak, the learned Counsel appearing on behalf of the defendant nos.1 and 2, has submitted that the defendant nos.1 and 2 were shifted from the old house to the suit tenement with a promise that the defendant nos.1 and 2 would be given a flat at the place where the old house was demolished and, therefore, the defendant nos.1 and 2 were not liable to be evicted until the said promise was fulfilled by the plaintiffs. Mr. Kantak, the learned Counsel has submitted that a plea to that effect was taken by the defendant nos.1 and 2 in para 2 of the written statement of the defendant nos.1 and 2 and the defendant no.1 had also deposed as regards the same and though, otherwise, the defendant no.1 had led no further evidence to support the said plea, the probabilities of the case certainly showed that it is the said plea of defendant nos.1 and 2 which had to be accepted and answered by the learned trial Court along with issue no.2 in favour of defendant nos.1 and 2 and which in fact, has not been considered at all. Mr. Kantak submits that if the said plea was considered then certainly the suit filed by the plaintiffs could not have been decreed.

5. On the other hand, Mr. S. G. Dessai, the learned Senior Counsel appearing on behalf of the plaintiffs has submitted that the substantial question framed by this Court vide Order dated 27-6-2003 does not arise at all for consideration as it is not based on any pleadings of defendant nos.1 and 2 and in this context, the learned Senior Counsel has placed reliance on the case of **Govindaraju** v. **Mariamman**(AIR 2005 SC 1008). Mr. Dessai has further submitted that even if the substantial question framed by this Court has got to be answered on merits, even then there is no evidence led by the defendant nos.1 and 2 to answer the said question, in their favour.

6. In my view, the submissions of Mr. Dessai, deserve to be accepted. The substantial question of law framed on 27-6-2003 is certainly not based on the pleadings of defendant nos.1 and 2 and otherwise also it is vague. The said substantial question encompasses a plea that the defendant nos.1 and 2 would be entitled to continue in the suit tenement to which they were shifted before the demolition of the old ancestral house, till such time they are given alternate premises by the plaintiffs but it does not set out as to why the defendant nos.1 and 2

should be given alternate premises. In para 2 of the plaint, the plaintiffs had pleaded that in the suit property there was a big residential house which was presently demolished by the plaintiffs and behind the main residential house the plaintiffs had constructed one shed, consisting of two tenements about 17 to 18 years ago and after the same were constructed the same were given on hire to different persons/tenants and more particularly to students. The defendant nos.1 and 2 in para 2 of the written statement partly admitted the contents of para 2 of the plaint but further stated that the mundkarial house of the defendants was demolished by giving false promise by the plaintiffs that the defendants would be given a flat in the place of partly demolished old residential house but once, the defendants mundkarial house was demolished, the plaintiffs began to dodge the defendants and as such, the defendants were forced to file the said Civil Suit No.105/90/D. It was certainly not the case of defendant nos.1 and 2 specifically pleaded that they were shifted from the old ancestral house to the suit tenement till such time they were given alternate premises by the plaintiffs and such a plea not having been taken by the defendant nos.1 and 2 in their written statement nor an issue in

the light of the said plea having been framed, the same certainly could not be the basis of a substantial question of law. The submission of Mr. Kantak that they were shifted from the old house to the tenement with a promise that they would be given a flat is not part of the substantial question framed and both(i.e. the substantial question of law and the submission made) are not part of pleadings of the defendant nos.1 and 2. The Supreme Court in the case of **Govindaraju** v. **Mariamman**(supra)after referring to several cases including the case of Santosh Hazari v. Purushottam Tiwari(AIR 2001 SC 965) has observed that a question to be a substantial question of law must be debatable, not previously settled by law or a binding precedent and answer to the same must have a material bearing as to the rights of the parties before the Court. It was further observed that as to what would be the question of law "involving in the case" that there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the Court of facts and it must be necessary to decide that question of law for a just and proper decision between the parties. The defendant nos.1 and 2 not having taken a plea in the light of the said substantial question of law, the

question framed could not arise as a substantial question of law. In fact till today the defendant nos.1 and 2 have not claimed any right to continue to occupy the suit tenement.

7. Admittedly, the defendant nos.1 and 2 could not claim any right either to the said ancestral house because the defendant nos.1 and 2 could not have any right to the same as defendant no.1 was an orphan and was brought up by the mother of plaintiff no.2 and lived as part of their family. The claim of defendant nos.1 and 2 to mundkarship was apparently falsely raised as a last resort by defendant nos.1 and 2 and was rightly dismissed by the Mamlatdar and thereafter by the Collector. The defendant no.1 did state in his evidence that the plaintiff (Xavier) had promised to stay temporarily in the suit tenement after which he would give a flat in the building which would be constructed in the property. However, the said statement was made by defendant no.1 for the first time without taking a plea to that effect in the written statement and not only that there was no other evidence to corroborate the said statement of defendant no.1. One does not know what plea the defendant

nos.1 and 2 had taken in the said R.C.S. No.105/90 either in relation to the old house or the suit tenement. It was the case of the plaintiffs that defendant nos.1 and 2 were allowed to occupy the suit tenement temporarily. If, the defendant nos.1 and 2 had no right to the old ancestral house, it is difficult to believe that the plaintiffs would have told defendant nos.1 and 2 to occupy the suit tenement temporarily till giving of a flat in the building which would be constructed in the property. In fact, it appears that defendant nos.1 and 2 with a view to hold on to the suit tenement having been taking from time to time conflicting pleas and even at one stage denied the title of the plaintiffs to the suit property inspite of the fact that defendant no.1 was brought up by the mother of plaintiff no.2. The defendant no.1 having not taken any specific plea that he was allowed to occupy the suit tenement till he would be given a flat and having also not led any evidence in support of the same, the defendant nos.1 and 2 had no right to continue occupying the suit tenement. In conclusion, it may be observed that the substantial question framed does not arise in the suit filed by the plaintiffs and in any event, the defendant nos.1 and 2 not having taken a plea in

the manner now sought to be argued nor having led any evidence to support the same, this appeal is bound to fail.

8. Consequently, the appeal is hereby dismissed. Considering the facts, the parties are left to bear their own costs.

N. A. BRITTO, J.

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